#5/Election
B
5/22/02

8553/213 Patent

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:

KAREL VAN DEN BERG

Serial No. 09/828,358 GROUP ART UNIT: 3644
Examiner: Kimberly S. Smith

Filed: April 9, 2001

For: A FEED METERING DEVICE

RESPONSE

To The Honorable Commissioner of
Patents and Trademarks
Washington, D.C. 20231

Sir:

In response to the Official Action dated April 17, 2002, wherein an Official Restriction was imposed, Applicant provisionally elects "Species I (directed to figure 1)" for prosecution in the instant Application. However, the Restriction Requirement is respectfully traversed.

The following claims are considered to read on Figure 1: 1, 31-34, 37, 41, 46-49 and 58-60.

Applicant questions reference in the Official Action to the five embodiments presented in the above-identified Application as being different "species" much less "distinct species". Although species are always specifically different embodiments, it does not necessarily or logically follow that specifically different embodiments are different species. This is particularly so in consideration of 35 USC 121 which provides that restriction may be required for one or more independent and distinct inventions.

Moreover, even if the separate embodiments in the instant Application should be considered to be different species, under 37 CFR 1.43, a reasonable number of species may be claimed in one Application.

The term "species" does not appear to be defined, as such, in the Manual of Patenting Examining Procedure or Rules of Practice applicable to patent cases or in the U.S. Code. However, it is a common term or word and is usually considered to involve a class of individuals or objects which is less extensive than a genus and at the same time is broader than varieties. Perhaps the best concise definition is "A class of individuals or objects grouped by virtue of their common attributes and assigned a common name; a division subordinate to a genus." See the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Third Edition. For example, dogs might fall within the same species, as a whole whereas german shepherds, poodles, saint bernards, collies, scotch terriers, bulldogs, etc. would be considered different breeds or varieties of dogs, not different species.

Although it is stated in the Manual of Patent Examining Procedure, Sec. 806.04(f) that claims to be restricted in different species must be mutually exclusive, it is submitted that by logic the reverse is not correct. That is because different individuals or varieties or breeds or races may have different characteristics by which they may be defined, it does not mean that they are different species. For example, males and females of all species have different characteristics but this does not mean they are

different sp cies. The fact that individuals and objects may be of different sizes and shapes as well as having different physical or mental characteristics is not sufficient, as such, to categorize them as being in different species.

In the instant invention, the claims are all for feed metering devices for providing feed in measured portions to animals. Not only are they for the same purpose but also they are similar in appearance and basically directed to performing the same or very similar functions insofar as animal feeding is concerned. They are, indeed, different embodiments, but that does not make them different species. In fact, it is submitted that to be different species to justify a Restriction Requirement, then the inventions must be independent and distinct within the meaning of 35 USC 121 which is not, on its face, correct in the instant Application.

In the above connection, it should be appreciated that there is a difference between patentably distinct claims and patentably distinct inventions within the meaning of 35 USC 121. Ultimately, the question of patentable distinction falls within ambit of 35 USC Sections 102 and 102 and this is true irrespective of whether or not the claims are in different patents or in the same patent. The impact of 35 USC 121 is simply that the imposition of a Restriction Requirement avoids any subsequent double patenting attack on the claims if they happen to be in different patents which the patentee has obtained following a Restriction Requirement. But, as a general rule, separate patent claims in the same patent are considered to define different inventions and to

be patentably distinct from other claims in th same pat nt. It is simply incorrect to state that this general rule is breached or otherwise adversely affected because an Applicant traverses a Restriction Requirement. It is thus respectfully but firmly submitted that a Patent Examiner cannot utilize the traverse of the Restriction Requirement as having any bearing on the applicability of the statutory criteria of patentability under 35 USC 103.

In view of the foregoing, Applicant provisionally elects the so-called "Species I" for examination, but respectively traverses the Restriction Requirement.

Respectfully submitted,

MASON, MASON & ALBRIGHT

By _____
Penrose Lucas Albright
Registration No. 19,082

2306 South Eads Street
Post Office Box 2246
Arlington, Virginia 22202
Tel. (703) 979-3242
Filed: May 17, 2002